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KEITH BAKER
P.L. # 2

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-187469, B-187516, B-187557 DATE: November 11, 1976

MATTER OF: Wheeler Brothers, Inc.

DIGEST:

Cancellation of solicitation was proper where agency was not arbitrary and capricious in finding that revision of material provision in the solicitation would be in the Government's best interests.

Wheeler Brothers, Inc. protests the cancellation of invitations for bids (IFB) F08502-76-09066 issued by MacDill Air Force Base, IFB F31601-76-09022, issued by Pope Air Force Base, and IFB F44600-76-09060, issued by Langley Air Force Base. Each of the referenced solicitations was based on a standardized Air Force-wide format used for solicitations for Contractor Automotive Parts Stores (COPARS) and contemplated requirements contracts for furnishing automotive and related vehicle parts and accessories for the vehicle fleets, aerospace ground equipment and generators when such parts are common to those parts stocked to support the vehicle fleets.

The MacDill IFB was issued on June 1, 1976, and has essentially two parts: (1) several items required the contractor to provide price lists and to specify a percentage discount for each category and (2) the contractor was also required to provide non-price listed (NPL) parts for cost plus a service charge stipulated by the Government. Bids were to be evaluated by applying the discount offered for each of the price-listed sections to the estimated quantity of purchases from that section.

A presolicitation conference was held on June 10, 1976, at which time McCotter Motors, Inc. (McCotter) objected to a paragraph of the solicitation which gave the contracting officer the right to require additional price lists any time the NPL dollar value exceeded 30 percent of total sales for any one month. McCotter pointed out that the discount which the contractor originally bid would be applied to items ordered off the additionally required price lists. This interpretation was apparently based on a

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section of the solicitation which states that: "Discounts proposed by the offeror shall remain in effect throughout the total life of the contract regardless of * * * variations in the schedule of price lists* * *." McCotter asserted that the requirement that the contractor supply items from additionally required price lists at the original discount bid would place it in a loss position.

Discussions were held between the officials of MacDill Air Force Base and the Tactical Air Command (TAC) and initially it was their joint opinion that this provision should not pose any unusual problems to bidders participating in the solicitation. On June 14, 1976, McCotter protested to our Office, objecting primarily to the requirement for furnishing additional price lists at the same discounts furnished with the bid.

Bids were opened on June 21, 1976, and all three bids received were determined to be responsive. Wheeler Brothers was the apparent low bidder. McCotter did not submit a bid in response to the IFB.

On September 8, 1976, the Air Force conferred with representatives of McCotter and subsequently with representatives of Wheeler Brothers regarding McCotter's objections to the solicitation. About 2 weeks after that conference, Air Force Headquarters sent a letter to all Directors of Procurement instructing them to make several changes in COPARS solicitations. As to the provision in question, the solicitations were to be revised to eliminate the requirement that additional price lists be furnished at the same discount rates offered in the original bid and to permit negotiation of the discount rates applicable to any additional price lists. The letter specified that in the event bids had been opened under an unrevised solicitation, the solicitation should be cancelled and bids resolicited. As a result of this letter, the COPARS solicitations at all three Air Force bases involved here were cancelled and bids have been resolicited under the revised format.

On September 20, 1976, Wheeler Brothers protested to this Office the cancellation of the original solicitation at MacDill, Pope and Langley Air Force bases. Wheeler asserts that cancellation of the original solicitations and resolicitation under similar specifications would be prejudicial to the integrity of the

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competitive bidding system since bid prices have been revealed. Specifically it asserts that cancellation of the original solicitation would be contrary to Paragraph 2-404.1(a) of the Armed Services Procurement Regulation (ASPR) which provides:

"The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation." (Emphasis added.)

The Air Force asserts that the revision was necessary in order to prevent the contractor from frequently being placed in a loss position. It states that the provision for furnishing additional price lists at discount rates fixed in the original bid prevented potential contractors from entering into competition due to the uncertainties and unknowns inherent in the original NEI provision.

Paragraph 10(b) of Standard Form 33A, included in the IFB, reserves to the Government the right to reject any or all offers. The statutory authority for such a provision is 10 U.S.C. § 2305(c) permitting the rejection of all bids when such action is determined to be in the public interest. In addition, ASPR § 2-404.1(b) (1976) provides that an invitation may be cancelled after bid opening but before award where "specifications have been revised", where the invitation did not provide for consideration of all factors of cost to the Government or where for other reasons it is "clearly in the best interest of the Government."

The fact that the terms of an IFB were deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed. Joy Manufacturing Co., 54 Comp. Gen. 237, 74-2 CPD 183. Our Office has objected to cancellation and resolicitation where the resolicitation would request essentially the same product, while allowing bidders to change their bids. See 52 Comp. Gen. 285 (1972). Such a resolicitation would result in an "auction" and would be prejudicial to the competitive bidding system. However, cancellation may be justified for urgent and compelling reasons, such as where there is a significant change in

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the terms and conditions of the solicitation, Columbia Van Lines, Inc.; District Moving & Storage Inc., 54 Comp. Gen. 955, 958 (1975), 75-1 CPD 295.

We have held that the determination whether a "cogent and compelling" reason exists for cancellation is a matter primarily within the discretion of the administrative agency and will not be disturbed in the absence of clear proof of abuse of discretion. 50 Comp. Gen. 50, 52 (1970). The protester inaccurately posited a rule that: "it is the burden of the party advocating the propriety of cancellation to present evidence to GAO to support its contention that a resolicitation would result in lower prices to the Government." The case which the protester relies on for this proposition held that where an agency does not cancel a solicitation, the burden is on the protester to show why the agency has abused its discretionary decision not to cancel. Automated Datatron, Inc., B-184022, September 16, 1975, 75-2 CPD 153. This holding is consistent with the general rule that the decision whether or not to cancel will not be reversed unless shown to be arbitrary and capricious or contrary to law.

The protester argues that the need to modify the solicitation so as to eliminate the unilateral right of the contracting officer to require additional price lists at a previously-fixed discount is not a "cogent and compelling" reason to cancel the solicitation. The protester first asserts that the change is insignificant because purchases will infrequently exceed 30 percent of the total monthly contract volume so as to allow the contracting officer to require furnishing of additional price lists. However, the record indicates that the possibility of NPL parts exceeding 30 percent of the total monthly contract value is not remote. Uncontradicted evidence indicates that at Pope Air Force Base, in the months of July, August and September 1976, NPL parts sales exceeded 30 percent of total parts sales for each month. Furthermore, the record indicates that estimates of future requirements at MacDill Air Force Base are over 37 percent of the estimated total parts sales (assuming discount rates at least as favorable as those offered by the low bidder on the cancelled solicitation). In light of the above, we are unable to conclude that the agency's finding that the NPL provision would be invoked in a significant number of instances was without foundation.

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The protester next asserts that it is unlikely that the contracting officer will actually request additional price lists and that even if he does, insubstantial quantities will be ordered from these additional lists. We recognize the speculative nature of the Government's expectations in this regard. It appears, however, that the provision for requiring additional price lists is designed to reduce NPL purchases and we find no convincing reason for questioning its effectiveness.

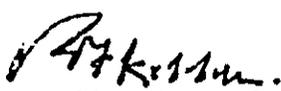
Finally, the protester asserts that the discounts available to bidders from their suppliers do not differ greatly and bidders therefore will probably be able to acquire any parts acquired off price lists subsequently furnished at approximately the same discount bid for items on the original lists offered with the bid. The protester points out that almost half of the bidders offered no discount for the category of price listed items under solicitation item 1b of Section E. The protester argues that because most bidders bid no discount or a low discount, they would not add a contingency factor to their bids to provide for the eventuality that their suppliers could not give them a sufficiently favorable discount. However, we are not persuaded by the protester's argument because the reason for the low discounts offered in this category has not been established. Furthermore, the record does not indicate, as the protester seems to assume, that most price lists will be added under item 1b. Unlike the discounts offered for item 1b, the discounts offered for the other items varied substantially among the bidders, which indicates to us that the discounts available to the bidders may vary. It is reasonable to assume that the discounts which a bidder offers are based upon the discounts he can expect to get from the suppliers of parts on the lists submitted with his bid. The protester has not shown that where additional price lists are required, the contractor will be able to get approximately the same discounts for items on the additionally-required price lists.

In our opinion the revised solicitation provides materially different terms and conditions because it significantly reduces the risk of loss otherwise assumed by bidders regarding the discounts applicable to additional price lists required during the contract period. We cannot conclude that the agency was arbitrary and capricious in finding that bidders may have included a contingency factor in their bid prices to protect against the assumed risks.

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We therefore conclude that cogent and compelling reasons exist to cancel the first solicitation and resolicit on the basis of revised terms and conditions.

Accordingly, the protests of Wheeler Brothers, Inc. are denied.


Deputy Comptroller General
of the United States